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No. 93-44

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLANTS TURNER BROADCASTING SYSTEM, INC., *ET AL.*

Of Counsel:

BERTRAM W. CARP
TURNER BROADCASTING SYSTEM, INC.
820 First Street, N.E.
Washington, D.C. 20002
(202) 898-7680

MARY ANN ZIMMER
ARTS & ENTERTAINMENT NETWORK
235 E. 45th Street
New York, NY 10017
(212) 661-4500

(List of Counsel Continued on Inside Cover)

BRUCE D. SOKLER
Counsel of Record
PETER KIMM, JR.
GREGORY A. LEWIS
MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300
Counsel for Appellants Turner Broadcasting System, Inc., Arts & Entertainment Network, Black Entertainment Television, Inc., E! Entertainment Television, Inc., Hearst/ABC-Viacom Entertainment Services, International Family Entertainment, Inc., National Cable Satellite Corporation dba C-SPAN, QVC Networks Inc., The Travel Channel, Inc., and USA Networks

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DEBBIE LEE
BLACK ENTERTAINMENT
TELEVISION, INC.
1232 31st Street, N.W.
Washington, D.C. 20007
(202) 636-2400

CHRISTOPHER FAGER
E! ENTERTAINMENT TELEVISION, INC.
5670 Wilshire Boulevard
Los Angeles, CA 90036
(213) 954-2400

JANE TOLLINGER
HEARST/ABC-VIACOM ENTERTAINMENT SERVICES
34-12 36th Street
Astoria, NY 11106
(718) 482-4221

LOUIS A. ISAKOFF
INTERNATIONAL FAMILY ENTERTAINMENT, INC.
1000 Centerville Turnpike
Virginia Beach, VA 23463
(804) 523-7300

BRUCE D. COLLINS
NATIONAL CABLE SATELLITE CORPORATION
400 North Capitol Street, N.W., Suite 650
Washington, D.C. 20001
(202) 737-3220

NEAL S. GRABELL
QVC NETWORK, INC.
1365 Enterprise Drive
West Chester, PA 19380
(215) 430-1000

LOUIS F. RYAN
THE TRAVEL CHANNEL, INC.
2690 Cumberland Parkway,
Suite 500
Atlanta, GA 30339
(404) 801-2400

STEPHEN A. BRENNER
USA NETWORKS
1230 Avenue of the Americas
New York, NY 10020
(212) 408-9100

QUESTION PRESENTED

Whether Congress, consistent with the First Amendment, may require operators of cable television systems to devote more than one-third of their channels to a special class of video programmers whose programming is favored by Congress—local broadcast stations—even though the direct effect of such requirement is to cause cable operators to drop or not carry the speech of unfavored video programmers, even though cable operators would prefer to carry a different mix of programming than that mandated by the government, and even though the provisions operate without regard to—and often in contravention of—the preferences of cable subscribers.

PARTIES TO THE PROCEEDINGS

Five separate civil actions were consolidated in the district court.

Plaintiffs:

The plaintiffs in each civil action brought in the district court are identified below.*

Civil Action No. 92-2247:

Turner Broadcasting System, Inc.
Arts & Entertainment Network
Black Entertainment Television, Inc.
E! Entertainment Television, Inc.
Hearst/ABC-Viacom Entertainment Services
International Family Entertainment, Inc.
National Cable Satellite Corporation
QVC Network, Inc.
The Travel Channel, Inc.
USA Networks

Civil Action No. 92-2292:

Daniels Cablevision, Inc.

Civil Action No. 92-2494:

Time Warner Entertainment Company, L.P.

Civil Action No. 92-2495:

National Cable Television Association, Inc.

Civil Action No. 92-2558:

Discovery Communications, Inc.
The Learning Channel, Inc.

Plaintiff-Intervenors:

Atlanta Interfaith Broadcasters, Inc.
National Interfaith Cable Coalition, Inc.

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* Appellants' Rule 29.1 disclosure statements are set forth in the Appendix to the Jurisdictional Statement at 111a-17a.

Federal Defendants:

Federal Communications Commission
United States of America

Defendant-Intervenors:

Association of America's Public Television Stations
Association of Independent Television Stations, Inc.
Community Broadcasters Association
Consumer Federation of America
The Corporation for Public Broadcasting
Sandra Engle
The International Association of Machinists and Aerospace Workers, AFL-CIO
International Broadcasting Network
The International Television Broadcasting, Inc.
Morningstar Communications
National Association of Broadcasters
National Council of Senior Citizens
National Rural Telecommunications Cooperative
Office of Communication of the United Church of Christ
Paging Associates, Inc.
The Public Broadcasting Service
Sherjan Broadcasting Co., Inc.
Triplett & Associates, Inc.
TV 14, Inc.
TV 58 St. Louis, Inc.
Zantech, Inc.

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BRIEF FOR APPELLANTS TURNER BROADCASTING SYSTEM, INC., *ET AL.*

OPINION BELOW

The opinion of the three-judge United States District Court for the District of Columbia is reported at 819 F. Supp. 32. It is reprinted in the Appendix to the Jurisdictional Statement ("J.S. App.") at 1a-72a.

JURISDICTION

The judgment of the district court was entered on April 8, 1993. Timely notices of appeal were filed in the district court on May 3, 1993. *See* J.S. App. 73a-81a. This Court noted probable jurisdiction on September 28, 1993.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1253. Section 23 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 555(c)(1), requires that challenges to Sections 4 and 5 of the Act "be heard by a district court of three judges convened pursuant to [28 U.S.C. § 1253]."

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534 & 535, together with other relevant provisions of the Act, are reprinted at J.S. App. 82a-110a.

STATEMENT OF THE CASE

On October 5, 1992, over a Presidential veto, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460. Among the most controversial provisions of the legislation were the so-called "must carry" requirements set forth in Sections 4 and 5 of the Act, 47 U.S.C. §§ 534 & 535, mandating that operators of cable television systems devote over one-third of their channel capacity to local broadcast television stations licensed by the Federal Communications Commission ("FCC" or the "Commission"). Twice before, the U.S. Court of Appeals for the District of Columbia Circuit had unanimously struck down such mandatory carriage obligations as violative of the First Amendment rights of cable programmers and cable operators.[1] In vetoing the legislation, President Bush specifically condemned the Act's must carry provisions as "unconstitutional," and noted that they "require[] cable companies to carry certain television stations regardless of whether the viewing public wants to see these stations."[2]

---

[1] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1032 (1988). Cable programmers create video programming distributed to the public through cable systems. Cable operators own and operate cable television systems, and increasingly produce their own locally-originated programming.

[2] 138 Cong. Rec. H1477 (daily ed. Oct. 5, 1992). President Bush described the legislation as "fallen prey to special interests." *Id.*

Appellant Turner Broadcasting System, Inc. filed suit challenging the constitutionality of Sections 4 and 5 less than an hour after Congress voted to override the President's veto.[3] Subsequently, numerous other cable programmers joined the *Turner* suit,[4] and additional parties filed separate actions challenging the must carry requirements as well as other provisions of the Act.[5] Consistent with the Executive Branch's view that the must carry provisions violated the First Amendment, the Department of Justice declined to defend the constitutionality of Sections 4 and 5 of the Act.[6] Only after the new Administration took office did the Department reverse its position and provide a defense to must carry. On April 8, 1993, by a 2-1 vote (Williams, J., dissenting), the three-judge district court upheld Sections 4 and 5.[7]

A. The Cable Medium

Cable television systems distribute video programming by transmitting video signals over coaxial and fiber optic

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[3] *Turner Broadcasting Sys., Inc. v. FCC, et al.*, Civil Action No. 92-2247 (D.D.C.). *See* J.S. App. 6a & n.7.

[4] Appellants represented on this brief (plaintiffs in No. 92-2247 below) are creators of the following cable program networks: The Turner networks (CNN, Headline News, TBS Superstation, TNT, and The Cartoon Network), The Arts and Entertainment Network (A&E), The Black Entertainment Television Network (BET), E! Entertainment Television, Lifetime Television Network, The Family Channel, C-SPAN, C-SPAN 2, QVC Network, The Travel Channel, USA Network, and The Sci-Fi Channel.

[5] J.S. App. 6a & n.8.

[6] *See* Letter from Assistant Attorney General Stuart M. Gerson to President of the Senate Dan Quayle (Nov. 4, 1992) (noting the "strong position" taken in the President's veto message that the must carry provisions are unconstitutional and stating that "[t]he Department of Justice provided the analysis that underlies the legal position taken in the President's message") (this letter is included in the Appendix accompanying appellants' Application for an Injunction Pending Appeal, filed in this Court April 19, 1993).

[7] The challenges to the non-must carry provisions were severed and heard by a single district judge. J.S. App. 7a. On September 16, 1993, the district court issued a decision upholding some provisions and striking down others. *Daniels Cablevision, Inc. v. United States*, 1993 U.S. Dist. LEXIS 12806 (D.D.C. 1993).

cables to their subscribers. Operators of cable systems select programming from a number of sources, including broadcast television stations, cable program networks, and locally-originated programming produced by cable operators themselves. Since its origination in the late 1940s, cable television has evolved from a sparsely employed "antenna service" to an electronic media outlet providing a wide variety of video programming choices from diverse sources.

Cable program networks are distributed almost exclusively through cable systems, and thus their potential audiences are generally limited to persons who choose to subscribe to cable.[8] Unlike broadcast television stations, which are licensed by the FCC to utilize portions of the electromagnetic spectrum free-of-charge to transmit their signals to television viewers,[9] a cable program network *must* obtain carriage on a cable system to reach a particular television audience. J.A. 59-60. A broadcast station's signal, by contrast, reaches over-the-air virtually every home within its licensed community even without carriage on a cable system. *Id.*

The supply of video programming alternatives currently exceeds the channel capacity of virtually all cable systems, and will for the foreseeable future. The average cable system in the United States has a capacity of approximately 40 channels, while 26 percent of systems have a capacity of fewer than 30 channels.[10] Currently, there are 80 national and 48 regional cable program networks,

[8] While cable television is presently available to approximately 95 percent of American households, only slightly over 60 percent choose to subscribe. *See* 1992 Cable Act § 2(a)(3); J.A. 306. The rate of cable subscribership has remained relatively steady over the past 12 years. In 1980, 55 percent of homes passed by cable actually subscribed. J.A. 306.

[9] *See* Communications Act of 1934, 47 U.S.C. §§ 301 *et seq.*

[10] J.A. 303. *See* S. Rep. No. 92, 102d Cong., 1st Sess. 3 (1991) ("Senate Report") ("the average cable system offers about 36 channels").

with additional networks being planned. J.A. 303. In addition, cable operators increasingly are creating their own locally-originated programming, including local news and information services. J.A. 241, 268. And, as of December 1992, over 2800 commercial, noncommercial, and low power broadcast television stations were operating throughout the country.[11]

B. Previous Must Carry Requirements and Their Repudiation

Must carry is not a new idea. As the District of Columbia Circuit explained when it first confronted must carry regulations, early federal regulation of the cable industry focused principally on ensuring that the growth of cable not "threaten the economic viability of broadcast television" or "undermine the regulatory framework already established" with respect to broadcast television.[12] Accordingly, the Commission sought "to channel the growth of cable" in a manner "consistent with" these objectives.[13]

"Must-carry rules in various forms have been major tools in this campaign to protect local broadcasting from cable." *Century*, 835 F.2d at 294. In 1965, the FCC imposed must carry requirements on cable systems receiving broadcast signals by microwave. *Rules re Microwave-Served CATV, First Report and Order in Docket No. 14895*, 38 FCC 683 (1965), and one year later adopted mandatory carriage obligations applicable to all cable systems that carried at least one broadcast signal. *Second Report and Order in Docket No. 14895*, 2 FCC2d 725 (1966). In addition, the Commission's fundamental objective—ensuring that cable "not undermine the financial

[11] *See* FCC News Release: Broadcast Station Totals as of December 31, 1992 (Jan. 13, 1993).

[12] *Quincy*, 768 F.2d at 1439.

[13] *Id.* at 1442. *See also Century*, 835 F.2d at 293 (since the mid-1960s, the FCC "has labored to protect the local broadcast media through regulation of the cable industry").

viability" of broadcast television—was reflected in many "regulatory siblings" of must carry.[14]

By the late 1970s and early 1980s, however, the Commission's view of cable television in relation to broadcasting began to change.[15] The Commission came to recognize that cable television had enormous potential to become a significant provider of diverse video programming in its own right, and that a federal communications policy centered merely on protecting local broadcasters from competition from alternative sources of video programming failed to serve the public interest. As the Commission explained in 1979:

> When we embarked upon the regulation of intermodal competition between cable and broadcast firms, *we proceeded upon the assumption that commercial broadcast television was our society's chosen instrument for the provision of video services.* Today, we appreciate that such services are being, and in the future will be to an even greater extent, supplied through a more diverse set of media.[16]

Congress also recognized that the Commission's early regulatory approach to cable television had *stifled*—not promoted—diversity. In enacting cable legislation in 1984, Congress concluded that "FCC policies in the 1960s and

[14] *See Quincy*, 768 F.2d at 1440, 1456.

[15] This reevaluation was driven in significant part by entrepreneurship within the cable industry. Satellite distribution of Home Box Office and TBS to cable systems was instituted in 1975 and 1976. The predecessor of The Family Channel was introduced in 1977. CNN, C-SPAN, USA Network, and Black Entertainment Television all were launched in 1979 and 1980.

[16] *Inquiry Into the Economic Relationship Between Television Broadcasting and Cable Television*, 71 FCC2d 632, 645-46 (1979) (emphasis supplied). At about the same time, the Commission began repealing a number of must carry's regulatory "siblings" as ill-founded, protectionist measures. *See Quincy*, 768 F.2d at 1442-43, 1455-58 (describing FCC's deregulatory actions and the analysis accompanying those actions).

early 1970s unfairly inhibited the growth and development of cable." [17]

In 1985, the D.C. Circuit invalidated the FCC's must carry rules as violative of the First Amendment.[18] The court found that the rules impinged upon First Amendment freedoms in three principal respects. *First*, the rules were explicitly designed to, and did in fact, promote a governmentally-favored class of speakers—local broadcasters—at the direct expense of other speakers—cable programmers.[19] *Second*, the must carry requirements imposed far-reaching intrusions on the constitutionally-protected editorial discretion of cable operators to select the mix of programming they offer their subscribers. 768 F.2d at 1452. *Third*, the rules "profoundly affect[ed] values near the heart of the First Amendment" by preventing cable program networks from reaching their intended audiences "even if that result directly contravenes the preference of cable subscribers," whose interests are "paramount." *Id.* at 1453 (citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)).

The *Quincy* court found it unnecessary to resolve the question of whether strict scrutiny or some other level of review properly applied, because the rules "so clearly fail[ed]" to survive review even under the more forgiving test, advocated by the government, set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), and its progeny. 768 F.2d at 1448. The Commission failed to demonstrate

[17] H.R. Rep. No. 934, 98th Cong., 2d Sess. 22 (1984), accompanying the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779. Congress noted that "by the mid-1970s, cable systems were reaching no more than 12 to 15 percent of American homes" and blamed this lack of growth on regulatory obstacles. H.R. Rep. No. 98-934, *supra*, at 21-22.

[18] *Quincy Cable TV, Inc. v. FCC*, *supra*.

[19] 768 F.2d at 1445-46, 1451-52. The court noted that "[u]nder the protective aegis of the rules, local broadcasters are guaranteed the right to convey their messages over the cable system while cable programmers must vie for a proportionately diminished number of channels." *Id.* at 1451.

that the burdens imposed on free speech were justified by the asserted governmental interest in "preserving" local broadcasting, the court concluded, because the government could not show that any genuine threat to local broadcasting even existed. *Id.* at 1455. Moreover, in view of the government's asserted interests, the rules were " 'grossly' overinclusive." *Id.* at 1460. In short, they were "tailored," if at all, to protect broadcast*ers*, not the public's interest in local broadcast*ing*.

Following the *Quincy* decision, and under pressure from the broadcast industry and some members of Congress,[20] the FCC promulgated new, "scaled back" must carry rules in 1986.[21] These revised rules limited the number of broadcast stations a cable system was required to carry to 25 percent of cable system capacity, and attempted to account for viewer interests by establishing a minimum viewership standard for broadcast stations to be eligible for carriage. Most importantly, the FCC determined that must carry rules should be phased out entirely; the revised rules were to remain in effect for a transition period of five years only.[22]

[20] *See* Senate Report at 39 (explaining how "Congress and the broadcast community" "forced" the FCC to go forward).

[21] *In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 1 FCC Rcd 864 (1986) ("*Report and Order*"). *See also In re Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems*, 2 FCC Rcd 3593 (1987).

[22] In support of its decision to eliminate must carry rules, the Commission emphasized that "the public interest would be better served by a policy that maximizes program choices, rather than one that protects one segment of the television industry by substantially limiting the ability of others to offer service to consumers." *Report and Order*, 1 FCC Rcd at 880. It expressly recognized "the impact on cable operators' and cable programmers' First Amendment rights" of must carry rules. *Id.*

Moreover, the Commission concluded that cable subscribers could receive broadcast signals not carried on cable if they so desired by using an inexpensive input selector or "A/B" switch. The five-year transition period was intended to give consumers time to become familiar with and connect such switches if they wished to do so. *Id.* at 886.

Despite their more limited scope and temporary character, the FCC's revised rules were also unanimously struck down as violative of the First Amendment. *Century Communications Corp. v. FCC*, *supra*. The court again found it unnecessary to decide whether exacting First Amendment scrutiny should apply, because the purported governmental interests were insufficiently substantiated regardless of the standard of review. 835 F.2d at 298. Noting that the rules were premised on an "assumption that in the absence of must-carry rules, cable companies would drop local broadcasts," the court found that "[e]xperience belies that assertion." *Id.* at 303. The court also cited reports of the Federal Trade Commission and the Department of Justice concluding that "absent must-carry rules, cable systems can be expected to carry *many or most* local broadcast stations." *Id.* (emphasis supplied).

C. Growth of Video Programming Alternatives Following the Demise of Must Carry and Similar Protectionist Measures

The demise of the FCC's must carry rules—together with the elimination of similar measures premised on the misguided notion that protecting broadcasters from competition would somehow promote "diversity"—vitiated the government's artificial distortion of the video marketplace and permitted genuine diversity to flourish. Over 120 national and regional cable programming services now provide a diverse mix of news, entertainment, public affairs, sports, financial, religious, minority-oriented, and children's programming. J.A. 60, 303. In 1976 there were four.[23] Basic cable program networks spent $340 million for programming in 1984; by 1991, that investment had increased to $1.5 billion.[24] As Congress itself noted in

[23] *See* NCTA, *Cable Television Developments* 7-A (March 1993).

[24] H.R. Rep. No. 628, 102d Cong., 2d Sess. 31 (1992) ("House Report"). For example, the news programming budget of CNN and Headline News was $65 million in 1984. In 1993 it will be $181 million. J.A. 62. A&E's investment in programming increased 450

1991, "[p]rogramming choices have . . . grown about 50 percent" since 1984. Senate Report at 3.

Broadcast television outlets, as well, have grown significantly during this period, as cable systems have invested in increased channel capacity. From July 1985, when *Quincy* was decided, to December 1992, the total number of broadcast television stations nearly doubled.[25] The number of broadcast television stations being carried on cable systems increased during the same period.[26]

The cable programmers represented in this action illustrate this growth and diversity of programming alternatives:

- *Turner Broadcasting System, Inc.*—Turner has been a pioneer in cable programming. Its networks include **CNN,** a 24-hour per day news cable program network offering up-to-the-minute national and international news, financial news, science and medical news, sports, weather, interviews, analysis, and commentary; **Headline News,** a second 24-hour per day news cable program network using a format which provides a consistent, updated half-hour newscast (and which allows local cable companies to insert a five-minute local newscast at the end of each half-hour); **Turner Network Television (TNT),** which commenced operations in 1988 and offers original programming, films, sports, and syndicated programming; and **The Cartoon Network,** which commenced operations in October 1992 and consists entirely of animated programming. In addition, Turner owns and operates **TBS Superstation,** an independent UHF television station operating in the Atlanta market and distributed throughout the United States on cable sys-

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percent during the same period. J.A. 45. Lifetime's total programming investment has grown ten-fold since its introduction in 1984, while USA Network's programming expenditures increased from $29 million in 1985 to $193 million in 1992. J.A. 36, 51.

[25] *Compare* FCC News Release: Broadcast Station Totals as of December 31, 1992 (Jan. 13, 1993), *with* FCC News Release: Broadcast Station Totals for July 1985 (Aug. 9, 1985). *See infra* at 40.

[26] J.A. 305. Moreover, the number of cities served by their own broadcast stations also increased. *Id.*

tems, offering original programming, movies, features, sports, and syndicated shows.

- *Arts & Entertainment Network*—**A&E,** launched in 1984, offers a variety of quality entertainment programming, including drama, documentaries, performing arts, and comedy. A&E has announced plans to launch **The History Channel,** focusing upon historical documentaries, in 1994.
- *The Black Entertainment Television Network*—**BET** offers urban contemporary programming including music videos, sports, family sitcoms, concerts, specials, talk shows, gospel, news, and other informational programming. BET has announced plans to launch **"BET on Jazz: The Cable Jazz Channel"** in 1994.
- *E! Entertainment Television*—**E!** provides continuous coverage of the entertainment industry through interviews, news, and features. Formerly named "Movietime," the network was originally launched in 1987. It was renamed and its format completely changed in 1990.
- *Hearst/ABC-Viacom Entertainment Services*—HAVES produces the **Lifetime Television Network,** a 24-hour service offering contemporary programming of particular interest to women six days per week. On Sundays, Lifetime offers **Lifetime Medical Television,** the world's foremost provider of television programs produced for medical professionals.
- *International Family Entertainment, Inc. (IFE)*—IFE owns and operates **The Family Channel,** originally launched in 1977 as "CBN Satellite Network." The Family Channel provides family-oriented entertainment including original made-for-television movies, dramatic and comedy series, classic westerns, specials, inspirational programs, and children's programming.
- *National Cable Satellite Corporation dba C-SPAN*—NCSC produces **C-SPAN,** created in 1979, and **C-SPAN 2,** introduced in 1986. Both channels are devoted entirely to informational and public affairs programming, including live gavel-to-gavel coverage of the proceedings of both the U.S. House of Representatives and the U.S. Senate, and a variety of other events at public forums

around the country and the world. NCSC was created and continues to be funded exclusively by cable television operators as an independent journalistic organization. It has no connection to any agency of government at any level.

- *QVC Network, Inc.*—**QVC,** which was launched in 1986, is a televised home-shopping service.
- *The Travel Channel, Inc.*—**The Travel Channel** offers programming dedicated to the subject of travel and related information, news, and specials. Originally launched in 1987, it offers original and acquired programs hosted by travel experts, authors, and newsmakers from around the world.
- *USA Networks*—USA operates two cable program services, **USA Network** and **The Sci-Fi Channel.** USA Network's programming includes original and previously-viewed movies, television series, cartoons, game shows, and other entertainment programming. The Sci-Fi Channel commenced operations in September 1992, and offers programming consisting of original series, previously-viewed theatrical movies and television series, and cartoons in the science fiction genre.

D. The Cable Television Consumer Protection and Competition Act of 1992

Confronted with the FCC's refusal to impose must carry rules a third time, and riding on the coattails of consumer complaints regarding increases in monthly cable bills, the broadcast industry convinced Congress to include new must carry requirements—even more sweeping than those struck down as unconstitutional in *Century*—in its 1992 cable legislation. 1992 Cable Act §§ 4 & 5, 47 U.S.C. §§ 534, 535. Not only do these provisions appropriate a greater portion of cable system capacity for the benefit of broadcasters than did the *Century* rules, they, unlike the earlier rules, contain *no mechanism whatsoever* for taking viewer interests and preferences into account.

Section 4 requires operators of cable systems with more than 12 channels—the vast majority of cable systems—

to devote up to one-third of their channels to carriage of local commercial broadcast stations.[27] Cable systems with 12 or fewer channels and more than 300 subscribers are required to carry at least three commercial broadcast stations. 47 U.S.C. § 534(b)(1)(A).

Section 5 conveys mandatory carriage rights to noncommercial broadcast stations, over and above the one-third of cable system channel capacity appropriated by Section 4. Cable systems with more than 36 channels must carry *all* noncommercial broadcast stations within 50 miles requesting carriage, unless the programming of a station requesting carriage "substantially duplicates" the programming of another station carried by the system.[28] Section 5(b) specifies that cable systems with between 12 and 36 channels are required to carry the signals of three qualified noncommercial stations. 47 U.S.C. § 535(b)(3). Significantly, however, Section 5(c) provides that notwithstanding the limits otherwise set forth in Section 5, each cable system must continue to carry *all* qualified noncommercial stations that were carried on March 29, 1990, regardless of the total number of local stations carried and regardless of the channel capacity of the system. *See* 47 U.S.C. § 535(c).

The statute also contains "channel positioning" requirements permitting broadcast stations to dictate the specific

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[27] *See* 47 U.S.C. §§ 534(b)(1)(B), 534(h)(1)(A). In the event there are not sufficient full power commercial stations to fill the allocated channel capacity, cable operators are required to carry the signals of qualified low power broadcast stations pursuant to 47 U.S.C. §§ 534(c) and 534(h)(2). The rules invalidated in *Century* contained no carriage requirements with respect to low power broadcast stations.

[28] *See* 47 U.S.C. § 535(e). *See In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992 (Broadcast Signal Carriage Issues)*, 8 FCC Rcd 2965, 2970 (1993) (*"Must Carry Report and Order"*) (a station does not "substantially duplicate" the programming of another if at least 50 percent of its "typical weekly programming" is "distinct").

cable system channels on which they must be placed.[29] Thus, under the statute, not only are cable networks forced off cable systems, those that do obtain carriage receive less desirable channel positions.

Finally, the purpose and effect of the must carry provisions cannot be understood without reference to the "retransmission consent" rights granted to commercial broadcasters by Section 6 of the Act, 47 U.S.C. § 325(b). Section 6 gives commercial broadcasters the right, if they so elect, to bar retransmission of their signals by cable operators. The effect of Section 6, in conjunction with Section 4, is to give all commercial broadcasters the option of demanding carriage by cable operators (free of charge) or demanding payment from cable operators for retransmission of their signals.[30] Under this new carriage scheme, popular commercial broadcast stations are able to demand payment from cable operators for carriage pursuant to Section 6, while, at the same time, cable operators are *forced* to carry relatively unpopular stations—without compensation—pursuant to Section 4.[31]

[29] Section 4(b)(6) requires each cable system to carry commercial stations and qualified low power stations on the cable system channel number on which each station is broadcast over the air, on which it was carried on January 1, 1992, *or on which it was carried on July 19, 1985*. 47 U.S.C. § 534(b)(6). Similarly, Section 5(g)(5) requires carriage of qualified noncommercial stations on the channel number on which each station is broadcast over the air *or on which it was carried on July 19, 1985*. *Id.* § 535(g)(5).

The July 19, 1985 date is significant, apart from being the date of the *Quincy* decision. Because cable systems at that time generally had more limited channel capacity, stations that now demand carriage on the channel on which they were *then* carried are guaranteed carriage on lower, more desirable channel numbers. *See* House Report at 55 (lower channels are more accessible to "grazing" by viewers).

[30] Prior to enactment of Section 6, cable operators were free to retransmit available over-the-air signals of local broadcasters subject only to the "compulsory license" provision of the Copyright Act. *See* 17 U.S.C. § 111.

[31] *See* J.S. App. 5a-6a. Moreover, the retransmission consent provision, which had no counterpart in the FCC's carriage rules,

The impact of the must carry provisions is significant. Thousands of cable systems today have little or no available channel capacity.[32] The record establishes that, given this lack of excess channel capacity, Sections 4 and 5 are having profound effects:

1. Throughout the country, cable systems already carrying a full complement of local broadcast stations are being forced to carry additional broadcast stations, displacing cable program networks and other programming.[33] A few examples illustrate the effect of the statute:

- A Viacom cable system in Marin County, California with 37 usable channels already carrying 14 broadcast stations (10 commercial and 4 non-commercial) with no available channel capacity was required to add 3 *additional* broadcast stations (2 commercial and 1 non-commercial), forcing the system to drop programming of 2 cable program networks.[34]

has exacerbated the impact of must carry. Powerful broadcasters have leveraged their retransmission rights to demand carriage of new broadcaster-affiliated cable program networks—now referred to in the industry as "ransom" channels—in exchange for retransmission of their signals. *See, e.g., NBC Says Cable Channel is Retrans Option*, Broadcasting & Cable, May 24, 1993, at 12; *Fox Signs Deals with Six MSOs*, Electronic Media, Aug. 2, 1993, at 1. NBC, ABC, and Fox, as well as some local stations, have signed retransmission consent deals involving operator agreements to launch new cable channels. Carriage of such broadcaster-affiliated cable networks, of course, is not counted towards the one-third of channel capacity that must be allocated to commercial broadcasters pursuant to Section 4.

[32] *See* Turner Plaintiffs' Statement of Material Facts as to Which There is No Genuine Issue ¶ 5 and affidavits cited therein. J.A. 178, 268-70, 304. Moreover, expansion of channel capacity can be an enormously expensive proposition. J.A. 304.

[33] J.A. 36-37, 45-46, 64-68, 135-36, 141-42, 144, 146, 277-78, 299-301, 307, 332.

[34] Because of the impact of the must carry requirements on this and other Viacom systems (*see* J.A. 277-80), Viacom commenced suit in the Northern District of California challenging Sections 4 and 5 as applied to Viacom. The three-judge district court held that Viacom's First Amendment claims—filed after the district

- A 38-channel system operated by Community Cablevision Company dba Dimension Cable Services in Orange County, California already carrying 11 broadcast stations (8 full-time and 1 part-time commercial, and 2 noncommercial) with no excess capacity was forced to add 4 *additional* commercial stations. As a result, programming of 4 cable program networks had to be dropped as well as operator-originated local programming.[35]
- C-SPAN, which has been dropped or reduced to part-time status by numerous cable systems as a result of the must carry requirements, was dropped from a 37-channel system in Steubenville, Ohio after the system was required to add 2 new noncommercial stations to its line-up. As a result of must carry, the system now carries 5 PBS affiliates.[36]

2. Cable program networks are finding it difficult or impossible to expand their audiences.[37] The Family Channel, for example, has found that launches on additional cable systems have come to a "virtual halt" due to must carry, while E! has found the Act has "created nearly a complete barrier to new launches." J.A. 55-56, 324.

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court decision in the present action—were barred by *res judicata* because Viacom is a member of appellant NCTA. *Viacom Int'l, Inc. v. FCC*, No. C-93-1984 EFL (N.D. Cal. Aug. 26, 1993).

[35] Dimension brought suit in the Central District of California challenging the must carry requirements as applied to this system. Like Viacom, however, Dimension's suit was held to be barred because its parent company is a member of NCTA. *Community Cablevision Co. v. FCC*, No. CV 92-3104-R (C.D. Cal. Sept. 23, 1993).

[36] *See Local Channels Bump C-SPAN in Some Areas Because of Cable Bill's "Must Carry" Provision*, Roll Call, July 19, 1993, at 3. In the Washington area, C-SPAN 2 was cut back to part-time service on a Jones Intercable system in Alexandria, Virginia in favor of an independent religious broadcaster from Manassas, Virginia (WTKK) asserting must carry rights. This system also carries 5 noncommercial stations, all of which enjoy must carry status. *See Dimming Cable's Eye on Congress*, Washington Post, Sept. 7, 1993, at E1, E4.

[37] J.A. 51-52, 63-68, 79-80, 291-92, 324.

3. Newer cable program services, such as The Sci-Fi Channel, The Cartoon Network, and The Learning Channel, are finding it especially difficult to obtain access to audiences because of the must carry provisions. J.A. 51-52, 64, 152-54. If upheld, must carry may have a crippling impact on announced, but yet unlaunched, networks such as A&E's The History Channel, BET's Jazz Channel, and a proposed Spanish-language version of CNN.

4. Most importantly, all of these impacts are occurring utterly without regard to, and often in direct contravention of, consumer preferences.[38]

5. The full impact of the must carry provisions, which only recently became effective, has yet to be felt. Stations presently ineligible for must carry status due to the quality of their signals (*see* 47 U.S.C. §§ 534(b)(4), 535(g)(4)) can take steps to extend or improve their signals and thereby qualify for mandatory carriage. Noncommercial stations with duplicative programming beyond the 50 percent limit (*see* note 28, *supra*) can qualify for must carry status by making adjustments in their programming. And, cable operators will shortly have to begin to add the "ransom" channels—broadcaster-affiliated cable program networks to be launched in the future pursuant to retransmission consent deals (*see* note 31, *supra*)—which will occupy additional channel capacity, making it even more difficult for other cable program networks to reach television audiences.

E. The Decision Below

The three-judge district court, by a 2-1 vote, upheld the constitutionality of the must carry provisions. The majority expressed the view that in enacting the statute, Congress sought to impose order on a "market in a commercial commodity . . . not a market in 'speech.'" J.S. App. 12a. That "video signals can only be used to convey a message is of no particular significance," the majority reasoned, as "[t]he same is true of printing presses, or broadcast transmitters . . . ." *Id.* at 12a-13a.

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[38] J.A. 76, 135-36, 146-47, 274-75, 327-28, 332.

The majority held that strict scrutiny did not apply. It opined that "[a] compulsory speech requirement, or one imposing upon the discretion of a speaker to say only what he wishes, it appears, is to be strictly scrutinized only if it appears that the government has prescribed the content—either the message or the subject matter—of the speech to be spoken." *Id.* at 16a. Similarly, with respect to the programmers' claims, the majority concluded that "[s]peaker-partial" regulations—"those that purportedly favor one group of speakers at the expense of others"—are not subject to strict scrutiny "unless they are content-based." *Id.* at 17a. "[I]f the must carry provisions are content-related at all," the majority asserted, "they are only marginally so, to the point of *de minimis*." *Id.* at 20a. Finally, although less than clear on this point, the majority appeared to conclude that "contextual factors unique to cable require relaxed First Amendment scrutiny of the must-carry provisions even if marginally content-related." *Id.* at 22a n.25.

Applying the criteria established in *United States v. O'Brien, supra*, and its progeny, the majority held that Sections 4 and 5 passed muster under that standard. As to the substantiality of the governmental interests set forth in the legislative "findings" (1992 Cable Act § 2(a)), the majority simply declined to conduct an independent review, stating that "[f]ederal courts do not ordinarily review the adequacy of the record before Congress to support the laws it enacts." J.S. App. 15a. Thus, with respect to "the factual premise on which the must-carry provisions are based, *viz.*, that local broadcasting is in peril," the court deemed it sufficient that Congress had determined "to its satisfaction" that local broadcast television "is in serious jeopardy." *Id.* at 24a-25a. The majority also found that the provisions are "sufficiently, if not surgically" tailored to their objectives.[39]

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[39] *Id.* at 26a. Judge Sporkin filed a concurring opinion. As to the programmers' claims, at least, its reasoning is unclear. *See* J.S. App. 46a-47a.

Circuit Judge Williams dissented. As to the standard of review, he concluded that "the proper test is strict scrutiny." J.S. App. 57a. Congress explicitly rested its decision to promote local broadcast stations, Judge Williams noted, on a finding about the content of the programming they offer. *Id.* at 51a. Indeed, because local broadcast stations were "legally bound" to offer certain types of programming by virtue of provisions of law outside the 1992 Cable Act, "the term used by the Act to define the benefitted class *automatically* entails content requirements." *Id.* at 51a-52a (emphasis in original). The statute, he found, "is content-based under controlling precedent." *Id.* at 54a.

Judge Williams then determined that the interests advanced in support of the law were inadequate to justify it. This determination, Judge Williams explained, did not turn on a resolution of the question of what degree of deference was due to the legislative findings, "because the legislative findings simply do not support the inferences needed to sustain must-carry."

> The problems are (1) there is *no* finding of any present or imminent harm; (2) the evidence of some dropping of broadcast channels in itself fails to show any widespread problem; (3) the proliferation of local broadcast stations since the end of the FCC's must-carry rules undermines any inference of a problem; (4) the findings as to structure and incentives, taken together with the evidence of cable's dependence on broadcasting, fail to raise the concern beyond the level of speculation; and (5) even if the hazard were perceptible, the record does not address the less intrusive alternatives.

Id. at 67a (emphasis in original). Judge Williams concluded that "[i]f findings as scantily connected to the conclusion as these can justify must-carry, then the door is open—even in the area of First Amendment rights—to exercise of the most naked interest-group preferences." *Id.*

SUMMARY OF ARGUMENT

From the cable *programmers'* perspective, the central vice of must carry is that it guarantees a governmentally-favored class of speakers—local broadcasters—access to television audiences through means which necessarily restrict the ability of cable programmers to reach the same audiences. While cable *operators* rightfully complain of, *inter alia,* the statute's invasion of their editorial functions, appellant cable programmers focus their challenge on the governmental decision to promote a special class of speakers at the programmers' expense.

1. The must carry provisions directly regulate the *programming*—the speech—that cable systems may offer their subscribers, and nothing else. In enacting these provisions, Congress has made it abundantly clear that its legislative objectives are speech-specific and content-based. Local broadcasters must be carried because they offer "unique . . . educational" programming, "local news and public affairs programs," "programs offering outlets for local cultural and artistic groups," "coverage of local and state government activities" and other types of speech the government seeks to promote, *and* because they are statutorily "accountable" to governmental authorities. Moreover, the question of whether particular broadcast stations qualify for must carry status under the statute turns upon official review of the *content* of the programming they offer. Sections 4 and 5 are not "content-neutral." Strict scrutiny applies.

The must carry provisions seek to promote the speech of governmentally-favored speakers through means which necessarily burden the First Amendment freedoms of other, less-favored speakers. As Judge Williams recognized, in view of the lack of unused channel capacity, "replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down. . . ." J.S. App. 55a. But "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others

is wholly foreign to the First Amendment. . . ." *Buckley v. Valeo,* 424 U.S. 1, 48-49 (1976). Fundamentally, the majority's view that the government may decide which speakers shall and shall not be heard—so long as it does not "overtly" discriminate on the basis of the content of their speech (J.S. App. 16a)—is contrary to the basic command of the First Amendment.

Strict scrutiny applies for additional, important reasons. Sections 4 and 5 deliberately interfere with—indeed usurp on a large scale—the editorial functions of members of the press in selecting the information they choose to provide to the public. And their impact on free speech and free press is direct and purposeful, not "incidental" to some governmental objective unrelated to regulating speech.

2. The apparent conclusion of the majority below that "contextual factors unique to cable" require "relaxed" First Amendment scrutiny of the must carry provisions "even if marginally content-related" (J.S. App. 22a n.25) has no principled basis. Neither the present economic or technological characteristics of cable television, nor any purported "government benefits" cable operators have received, justify branding the cable medium as a whole with an inferior constitutional "status," or tolerating the infringement of cable programmers' rights here.

3. The government asserts that the burdens these provisions impose on free expression are justified by asserted governmental interests in "preserving" local television service, promoting "diversity," and promoting "fair competition." Yet even if such interests might be considered substantial "in the abstract," the government may not silence the speech of cable programmers as a means to further them. In any event, the purported threat to these asserted interests is nonexistent.

First, by any objective standard, "local broadcasting" is thriving. More television broadcast stations are available to Americans today—both over-the-air *and* on cable systems—than at any time in the Nation's history. *Second,* the "diversity" of video programming alternatives avail-

able to the public has increased dramatically over the past eight years in the *absence* of must carry. Like their predecessors, the new must carry requirements will harm —not promote—programming diversity. *Third*, it is undisputed that the vast majority of local broadcast stations have in fact been carried on cable systems in the absence of must carry requirements. Indeed, Congress acknowledges that no "widespread pattern of denying carriage" to broadcast television stations exists.

4. The must carry provisions burden substantially more speech than is necessary to serve any legitimate governmental interest. And though the government asserts that the must carry scheme is a "carefully crafted mechanism to promote the interests of viewers," the statute—unlike prior must carry rules—in fact contains *no mechanism whatsoever* to account for viewer interests and preferences.

This failure to account for the interests of viewers, the absence of any genuine threat to "local broadcasting," the undisputed evidence that most broadcast stations are carried by cable systems, and the "extremely weak" fit (J.S. App. 58a) between the purported governmental interests and the sweeping provisions adopted, not only establishes the constitutional invalidity of Sections 4 and 5 but also reveals them for what they are: blatantly protectionist, special interest measures which, like their predecessors, will in fact *reduce* competition in the video marketplace to benefit broadcasters and *reduce* the video programming alternatives available to television viewers.

ARGUMENT

I. THE MUST CARRY REQUIREMENTS OF THE 1992 CABLE ACT ARE SUBJECT TO EXACTING FIRST AMENDMENT SCRUTINY

The district court majority asserted that in the 1992 Cable Act Congress sought to regulate only "the *means of delivery* of video signals" and "not the information the video signals may be used to impart." J.S. App. 12a (emphasis supplied). This assertion is contradicted by the express terms of the must carry provisions themselves, the

congressional "findings" supporting them, as well as the legislative reports accompanying the Act. The must carry provisions directly and purposefully regulate the *programming* cable operators must offer their subscribers, not merely its "means of delivery." They regulate speech and nothing but speech. Under applicable precedents, they are subject to exacting First Amendment scrutiny.

A. Sections 4 and 5 Are Content-Based

It is well-established that the First Amendment bars governmental regulations which discriminate on the basis of the content of expression except in the most compelling and narrow circumstances.[40] In assessing content neutrality, the Court has repeatedly "rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas,'" *City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1516 (1993) (quoting *Simon & Schuster*, 112 S. Ct. at 509), and has made clear that "distinguishing among *types of speech* requires that [a] statute be subjected to strict scrutiny." *Burson*, 112 S. Ct. at 1855. To be deemed "content neutral," a regulation affecting expressive activity must, at minimum, be justified "without reference to the content" of the regulated speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

As Judge Williams recognized, the must carry provisions extend the privilege of government-mandated access to cable systems only "to a special class of unaffiliated programmers—local commercial and non-commercial tele-

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[40] *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545 (1992) (government may not regulate speech based on hostility "or favoritism"); *Burson v. Freeman*, 112 S. Ct. 1846, 1855 (1992); *Forsyth County, Georgia v. Nationalist Movement*, 112 S. Ct. 2395, 2403, 2404 (1992); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Riley v. Nat'l Fed'n of the Blind of North Carolina*, 487 U.S. 781, 795, 800-01 (1988); *Consolidated Edison Co. of New York v. Public Service Comm'n*, 447 U.S. 530, 536-37 (1980).

vision stations." J.S. App. 51a. Congress "rested its decision to promote these stations in part, but quite explicitly, on a finding about their content—that they were 'an important source of local news and public affairs programming . . . critical to an informed electorate.'" *Id.* (quoting 1992 Cable Act § 2(a)(11)). In fact, the statute and relevant committee reports are replete with content-based, speech-related justifications for the must carry provisions. The legislative "findings" identify the "governmental interests" purportedly served by the must carry requirements as, *inter alia*, distributing "unique noncommercial educational programming" (§ 2(a)(7)); providing "programming that is responsive to the needs and interests of the local community" (§ 2(a)(8)(B)); supporting "local origination of programming" (§ 2(a)(10)); and, ensuring that broadcast television stations "continue to be an important source of local news and public affairs programming" (§ 2(a)(11)).[41]

Further, whether particular broadcast stations may assert must carry rights on particular cable systems depends on the content of the programming they offer. Pursuant to Section 4, a broadcaster may request the FCC to modify the "local" geographic market in which the station may assert must carry rights. 47 U.S.C. § 534(h)(1)(C). The statute provides that in considering such requests, the Commission shall take into account, *inter alia*, whether the station "provides coverage or other local service to such community" and whether other stations "provide[] news coverage of issues of concern to such community or provide[] . . . coverage of sporting and other events of interest to the community."[42] Similarly,

[41] Even the "economic" goals of the legislation are expressed not in terms of creating jobs or improving the balance of payments, but in terms of ensuring "the economic viability of free local broadcast television and *its ability to originate quality local programming* . . . ." *See* § 2(a)(16) (emphasis supplied).

[42] 47 U.S.C. § 534(h)(1)(C)(ii). The Commission's rules implementing the must carry requirements suggest that "[c]overage of news or other programming of interest to the community could be demonstrated by program logs or other descriptions of program offerings." *Must Carry Report and Order*, 8 FCC Rcd at 2977.

to qualify for must carry status, a low power station must meet express requirements with respect to "nonentertainment programming: programming . . . involving political candidates, election issues, controversial issues of public importance, editorials and personal attacks; [and] programming for children."[43] Whether a particular noncommercial station must be carried turns upon a determination of whether 50 percent of its "typical weekly programming" is "distinct" from programming of another noncommercial station. *See supra* at 13 & n.28.

The legislative reports confirm the congressional purpose of promoting broadcast programming because of its content. The House Report asserts that without mandatory carriage requirements, the result would be "reductions in local news, public affairs, and other public interest programs . . . ." House Report at 51-52. Indeed, in justifying the mandatory carriage requirement for noncommercial stations, Congress could hardly have been more content-specific:

> [P]ublic television stations have developed a wide array of programming to fulfill their legislative mission and to serve the public interest, including the familiar and acclaimed "Sesame Street," "3-2-1 Contact," "Mister Rogers' Neighborhood," and "Where in the World is Carmen San Diego?" for children; informative news and public affairs programming such as "The MacNeil Lehrer NewsHour;" unique cultural series such as "Live From Lincoln Center" and "American Playhouse;" documentaries such as "Nova" and the "National Geographic Specials;" and

[43] *See* 47 U.S.C. § 534(h)(2)(B). Further, the Commission is to determine whether "the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power . . . stations." *Id. See also* § 534(g) (requiring FCC to conduct proceedings to determine whether broadcast television stations predominately utilized for the transmission "of sales presentations or program length commercials" are serving the "public interest" and should qualify for must carry status).

> special series such as "The Civil War," "Ethics in America," and "Eyes on the Prize." . . . Local public television stations also provide a variety of special services to their communities, including local news and public affairs programs, programs offering outlets for local cultural and artistic groups, and coverage of local and state government activities and personalities.

Id. at 69. On the same pages, the report asserts a "compelling governmental interest" in "*increasing the amount of educational, informational and local public interest programming* available to the nation's audiences," and concludes that "mandatory carriage of noncommercial television stations would further this important goal." *Id.* at 69-70 (emphasis supplied).

Plainly, "it cannot be said that the [statute's] justification 'ha[s] nothing to do with content,'"[44] or that the statute "serves purposes *unrelated* to the content of expression . . . ."[45] Indeed, as Judge Williams emphasized, because every local broadcaster is *required by law* to provide programming of a type mandated by the government, "the term used by the Act to define the benefitted class *automatically* entails content requirements." J.S. App. 51a-52a (emphasis in original). It is no accident that the speakers who are given federally-guaranteed access to television audiences are those media entities over which the government exercises the greatest formal and informal control. The Senate Report emphasizes that broadcast stations "have a statutory obligation to serve their local communities" and are "accountable to the public interest"—that is, directly accountable to the government.[46]

[44] *Forsyth County*, 112 S. Ct. at 2403 (quoting *Ward*, 491 U.S. at 792).

[45] *Ward*, 491 U.S. at 791 (emphasis supplied).

[46] Senate Report at 40 (quoting separate statement of Commissioner Quello in *Report and Order*, 1 FCC Rcd at 912). *See also* House Report at 50-51 (describing the programming broadcast stations have offered "to fulfill their legislative mission"). *See, e.g.*, 47 U.S.C. § 303b (children's programming considered in

"Cable," by contrast, has "little or no *program* accountability to any public or government authority."[47]

B. The Must Carry Requirements Impermissibly Burden the Speech of Certain Speakers in Order to Promote the Speech of Other, Governmentally-Favored Speakers

The must carry requirements create a governmentally-imposed pecking order of speakers: commercial and non-commercial local broadcasters who are guaranteed access to television audiences, and then cable programmers and others who must compete with each other for the channel capacity left over. But as this Court has long held, "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *Buckley*, 424 U.S. at 48-49. Indeed, any speech-related law that artificially "limits the size of the audience" a speaker may reach raises fundamental First Amendment concerns. *Meyer v. Grant*, 486 U.S. 414, 419, 422-23 (1988).

Consistent with these principles, the D.C. Circuit in *Quincy* held that governmental rules which guaranteed local broadcasters the right to convey their messages to cable audiences through means which necessarily forced cable programmers to vie for a diminished number of channels abridged the First Amendment rights of cable programmers. 768 F.2d at 1451-52. The must carry provisions of the 1992 Cable Act operate in precisely the same manner and result in precisely the same First Amendment injury to cable programmers. As Judge Williams explained, "[g]iven the finite number of cable chan-

license renewal); Public Telecommunications Act of 1992, Pub. L. No. 102-356, § 16(a) (authorizing FCC to regulate "indecent" programming); 47 U.S.C. 312(a)(7), 47 C.F.R. § 73.1944 (access for federal political candidates); 47 C.F.R. § 73.1930 (regulating "political editorials"); 47 C.F.R. § 73.1920(a) (mandating right to respond to "personal attacks"); 47 C.F.R. § 73.621 (regulating programming of noncommercial educational television stations).

[47] Senate Report at 40 (emphasis supplied).

nels, replacement of the cablecaster's choice of programs with those of local broadcasters suppresses the alternative programs as completely as if Congress had ordered them shut down. . . ." J.S. App. 55a.

The majority did not dispute that the imposition of this burden on the speech of cable programmers constitutes a First Amendment injury giving rise to a First Amendment "claim" (J.S. App. 13a-14a & n.19); it concluded, however, that the "speaker-partiality" embodied in the statute is not "content-based" and therefore does not trigger "strict" scrutiny. J.S. App. 17a-18a. The majority's analysis is wrong on a number of counts.

First, for all the reasons set forth in Point I.A. above, the "speaker-partiality" embodied in the statute is in fact *expressly* content-based. Local broadcasters are favored because they offer "educational" programming, "local news and public affairs programs," "programs offering outlets for local cultural and artistic groups," "coverage of local and state government activities," and other "types of speech" (*Burson*, 112 S. Ct. at 1855) the government seeks to promote. They are favored because they are "accountable to the public interest." Senate Report at 40. In short, the *content* of the programming they offer is of a type the government considers "especially worthy," and, perhaps more importantly, is subject to significant governmental control. *See* J.S. App. 53a. Even assuming, *arguendo*, the purest of intentions, the First Amendment bars Congress from creating this mandatory hierarchy of speech—or speakers—on the basis of the government's assessment of the worthiness or importance of particular types of speech.

Second, there is no principled basis for the majority's conclusion that the First Amendment permits the government to decide which speakers shall be heard and which shall not—so long as it does not "overtly" discriminate on the basis of content. J.S. App. 18a. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak *and the speakers who may address a public*

issue." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-85 (1978) (emphasis supplied). *See Buckley*, 424 U.S. at 18 (government may not "discriminate *among speakers or ideas.*").[48] Rather, " '[t]he constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . .' " *Leathers v. Medlock*, 111 S. Ct. 1439, 1444 (1991) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)). For the government to pick and choose who may or may not speak is fundamentally inconsistent with the basic command of the First Amendment. "[F]ree and robust debate cannot thrive if directed by the government." *Riley*, 487 U.S. at 791. *Any* statute which explicitly grants a particular class of speakers preferred access to public audiences at the expense of other First Amendment speakers should be given the most exacting scrutiny.

We emphasize that this case does not involve merely the granting of a subsidy or benefit to one group in society that is not granted to another group.[49] Rather, the issue here, and the fundamental First Amendment concern articulated in *Buckley*, is the promotion of the speech of certain classes of speakers *by means of* placing burdens on the constitutionally-protected speech of others. 424 U.S. at 48-49. Thus, in *Buckley*, the expenditure limitations restricting the speech of some in order to give others better access to public audiences were subject to strict scrutiny—and struck down—even though they were

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[48] (Emphasis supplied.) *See also City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 176 (1976) (government may not "discriminate between speakers on the basis of their employment, *or* the content of their speech.") (emphasis supplied).

[49] *Compare Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 546 (1983) (Congress is not obliged to "subsidize" lobbying); *Leathers*, 111 S. Ct. at 1447 (the state legislature "has chosen simply to exclude or exempt certain media from a generally applicable tax"). The majority appears to have understood the distinction. J.S. 13a-14a & n.18.

"neutral as to the ideas expressed." *Id.* at 39. And in doing so, the Court specifically reversed the Court of Appeals' conclusion that the *O'Brien* standard applied. *Id.* at 15-17. Here, even such neutrality is lacking.

C. Because the Must Carry Provisions Regulate and Interfere With Editorial Decisions of Members of the Press, They Are Subject to the Highest Level of Constitutional Scrutiny

Few laws more directly confront the First Amendment than one which purposefully and directly interferes with the editorial functions of the press in selecting the information it chooses to provide to the public. As the Court stated in *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), "[i]t has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time." This teaching applies fully here: "Cable television provides to its subscribers news, information, and entertainment. It is engaged in 'speech' under the First Amendment, and is, in much of its operation, part of the 'press.' " [50] Further, as the Court recently affirmed, "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech" and therefore is considered "content-based regulation of speech." *Riley*, 487 U.S. at 795.

The FCC has found that "cable operators now function as independent media voices exercising broad editorial control over content," and that "[t]his editorial function whereby cable operators select and tailor their program mix to meet viewer interests or other objectives is akin to that performed by publishers of print media." *Report and Order*, 1 FCC Rcd at 879-80. There can be

[50] *Leathers*, 111 S. Ct. at 1442. This Court has long recognized that a cable operator's selection of programming to offer its subscribers involves the exercise of editorial discretion. *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 & n.17 (1979).

no debate that the must carry provisions dramatically impinge upon this constitutionally-protected editorial function. They expressly wrest editorial control of roughly 40 percent of a cable operator's channels from the operator —channels that cable programmers can no longer even compete for—and vest that control with the government. Such a law demands the highest level of constitutional scrutiny.

We join the more-detailed arguments on this point set forth in the briefs of the other appellants representing cable operators.[51]

D. Sections 4 and 5 Impose Direct—Not "Incidental" —Burdens on First Amendment Freedoms

As the discussion above makes clear, the must carry provisions of the 1992 Cable Act purposefully and directly regulate speech and the press to achieve speech-related objectives. Indeed, they do *nothing other* than specify the programming that must be offered to cable subscribers and the channel positions on which specific programming must be carried. These provisions bear no resemblance to the types of laws this Court has tested under the standard set forth in *United States v. O'Brien*, *supra*, and its progeny. The majority's conclusion that the *O'Brien* standard applies to these speech-specific provisions (J.S. App. 15a, 22a) is unsustainable, regardless of the "economic" label placed on the legislation by its proponents.

This Court's decision in *Riley*, *supra*, which the majority chose to ignore except on another point, gives guidance as to what constitutes a direct—as opposed to merely "incidental"—burden on speech. In *Riley*, the Court invalidated a state statute limiting the fees that professional fundraisers could charge charities, finding that provision restricted both charities' and fundraisers'

[51] While we refer to the operators' briefs on this point, we note that cable programmers unquestionably have standing to raise this argument independently. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963); *Block v. Meese*, 793 F.2d 1303, 1309 (D.C. Cir.) (Scalia, J.), *cert. denied*, 478 U.S. 1021 (1986).

"ability to speak." 487 U.S. at 794. In rejecting the assertion that the statute should be considered merely "economic" legislation having only an "incidental" effect on speech, the Court stated that "[f]ar from the completely incidental impact of, for example, a minimum wage law, a statute regulating how a speaker may speak directly affects that speech."[52] Such a statute, the Court held, must be subject to "exacting" First Amendment scrutiny.

As *Riley* and similar decisions of this Court make clear, laws aimed at regulating speech itself, or the speech-related functions of the press, may be upheld—if at all—only if they are necessary to serve a compelling government interest and are precisely tailored to do so.[53] The more relaxed *O'Brien* standard, by contrast, was formulated to address laws regulating "conduct" where particular applications of such laws may have "incidental" effects on the exercise of free expression.[54]

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[52] *Id.* at 788-89 & n.5. Moreover, the asserted purpose for the statute at issue in *Riley*—preventing fraud—was significantly *less* speech-related than the asserted governmental interests in the present case (*e.g.*, promoting specific types of video programming).

[53] *See, e.g., Buckley*, 424 U.S. at 15-17; *Miami Herald*, 418 U.S. at 254-57; *Gentile v. State Bar of Arizona*, 111 S. Ct. 2720, 2724 (1991) (strict scrutiny required where "speech is . . . the direct target of the regulation or statute in question") (plurality opinion). *See also Talley v. California*, 362 U.S. 60, 64-66 (1960).

[54] *O'Brien*, 391 U.S. at 376; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984). In *O'Brien*, the Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, *a sufficiently important governmental interest in regulating the nonspeech element* can justify *incidental* limitations on First Amendment freedoms." 391 U.S. at 376 (emphasis supplied).

A similar standard of review applies to "time, place, and manner" regulations affecting activities protected by the First Amendment. *Ward*, 491 U.S. at 798; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). "[T]he essence of time, place, or manner regulation lies in the recognition that various *methods* of speech, *regardless of their content*, may frustrate legitimate govern-

As *Quincy* emphasized, the governmental objective in promulgating must carry rules "is a far cry from the sort of interests that typically have been viewed as imposing a merely 'incidental' burden on speech."[55] Judge Williams agreed. *See* J.S. App. 55a (there "is nothing 'incidental' about the burden"). The majority itself described the issue as what level of scrutiny applies "to speech regulation" in the cable context. J.S. App. 9a. Neither the court below nor appellees contends that the must carry requirements seek to regulate only some "nonspeech element" of "conduct," or that they may be regarded merely as "time, place, and manner" regulations.

Instead, appellees seek to escape rigorous First Amendment scrutiny merely by referencing the purported "economic" purposes of the legislation. Again, this is precisely the argument that was advanced and rejected in *Riley*. The ability to articulate a legitimate governmental objective does not, by itself, take a statute out of the realm of strict scrutiny.[56] This Court has "long recognized

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ment goals." *Consolidated Edison Co. of New York v. Public Service Comm'n*, 447 U.S. at 536 (emphasis supplied). Although a particular time, place, or manner regulation may "directly" regulate expressive activities (*e.g.*, the noise level), its validity depends upon "whether some interest *unrelated to speech* justifies" the regulation at issue. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988) (emphasis supplied).

[55] 768 F.2d at 1451. The House Report concedes that "[t]he analogy between must carry regulations and the type of regulation dealt with in *O'Brien* is questionable" and that the new cable law "is quite different from the regulations which have been generally been [sic] analyzed under *O'Brien*." House Report at 61 n.90.

[56] *See City of Cincinnati*, 113 S. Ct. at 1516-17 (the fact that the City "justified" restriction on "commercial handbills" by referencing the City's interest "in safety and esthetics" did not change the "content-based" nature of the ordinance). Indeed, in most strict scrutiny cases the governmental purposes asserted are entirely legitimate. *See, e.g., Burson*, 112 S. Ct. at 1851-52 (preventing voter intimidation at polling places); *Simon & Schuster*, 112 S. Ct. at 510 (compensating victims of crime); *Riley*, 487 U.S. at 789 (preventing fraud); *Sable Communications*, 492 U.S. at 126 (protecting well-being of minors). There is no requirement, as the

that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." [37] Neither the *O'Brien* analysis, nor the comparable analysis applicable to "time, place, and manner" regulations used in cases such as *Ward* or *Renton*, applies to a law which *on its face* regulates the information that members of the press provide to the public (or which otherwise explicitly regulates the content of speech) merely because an assertedly neutral justification is proffered for the statute.

Like the statute at issue in *Riley*, the must carry provisions directly and purposefully regulate protected First Amendment activity. Even assuming, *arguendo*, "the purest of motives" on the part of legislators, these provisions deserve the same "exacting" First Amendment scrutiny. *Riley*, 487 U.S. at 791.

II. NO PRINCIPLED BASIS EXISTS FOR APPLYING A "REDUCED" LEVEL OF CONSTITUTIONAL SCRUTINY TO THE CABLE MEDIUM

In its Motion to Affirm, the government asserted that technological and economic characteristics of cable television, as well as purported government "benefits" that cable operators have received, justify a "reduced" level of constitutional protection for the cable medium generally—akin to the "scarcity doctrine" applied to over-the-air broadcasters. Similarly, the majority below, with less-than-ample clarity, suggested that "contextual factors unique to cable require relaxed First Amendment scrutiny of the must-carry provisions" even if they are, as the majority characterized them, "marginally content-related." J.S. App. 22a n.25.

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majority below appeared to assume, that the underlying governmental purpose must be "nefarious" or improper (J.S. App. 20a) to trigger strict scrutiny. That being said, there is ample evidence supporting President Bush's characterization of the 1992 Cable Act as "fallen prey to special interests." *See* note 2, *supra*.

[37] *Simon & Schuster*, 112 S. Ct. at 509; *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983).

The Court should decline the invitation to brand the cable medium with an inferior constitutional "status" based on the bundle of imprecise and variable "contextual factors" relied upon by the government and the majority below. While each medium of expression "may present its own problems," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975), "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952). Those basic principles apply fully here. To the extent particular characteristics of the cable medium may bear upon the constitutional analysis, such factors are most appropriately considered in the context of assessing the specific governmental interests put forth to justify the specific regulation at issue—not by creating a second "scarcity doctrine."

We join the briefs of the other appellants demonstrating that none of the characteristics of cable television appellees rely upon—*e.g.*, cable's use of public rights of way or the existence of local cable monopolies—justifies diminished First Amendment protection. We note, however, that the Court need *not* decide the question of whether the First Amendment protection afforded cable television is in every respect co-extensive with that of the print press to conclude that the must carry provisions properly are subject to strict scrutiny and cannot survive judicial review. None of the "contextual factors" identified by the government or the court below justify sweeping must carry requirements which solely benefit a special class of governmentally-favored speakers at the direct expense of all others. We do wish to address, however, the assertion that "vertical integration" in the cable industry somehow justifies the Act's must carry requirements.

The fact that some cable operators have invested in some cable programming services does not justify sweeping, universal must carry privileges for broadcasters. Although Congress theorized that affiliations between operators and cable program networks create "incentives" for operators to favor their affiliated networks with re-

spect to carriage, the record offered no evidence that such affiliations had given rise to any actual, serious problem. As summarized in the House Report, a study by the National Telecommunications and Information Administration (NTIA) of the Department of Commerce concluded that "none of the top five multisystem operators (MSOs) showed a pattern of favoring basic services with which they were affiliated." [58]

As to this non-existent problem, the must carry provisions represent a non-existent solution. As Judge Williams points out, Sections 4 and 5 grant mandatory access to only a "special class" of unaffiliated programmers—broadcast stations—who benefit universally, on all cable systems, regardless of whether a cable system has an interest in *any* programmer. J.S. App. 51a, 53a n.2. Sections 4 and 5 are not a solution to "vertical integration": they are special rights granted solely to broadcasters.[59] Moreover, to the extent vertical integration is a concern *at all*, Congress has addressed it directly in Section 11(c) of the 1992 Cable Act.[60]

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[58] House Report at 41 (quoting NTIA, *Video Program Distribution and Cable Television: Current Policy Issues and Recommendations* 102 (June 1988)). The Report acknowledges that operator investments have made the creation of innovative, and risky, programming services possible and have *promoted* programming diversity. *Id.*

[59] A large number—almost half—of national cable program services have *no* affiliation with the operating side of the industry. *See* House Report at 41. Similarly, many operators have no or extremely limited interests in program services. *See, e.g.*, J.A. 272, 326.

[60] Section 11(c) directs the FCC to prescribe regulations "establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest." 47 U.S.C. § 533(f)(1)(B). The Commission has now done so. *In re Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 (Horizontal and Vertical Ownership Limits) Second Report and Order*, MM Dkt. No. 92-264 (Oct. 22, 1993). Section 11(c) and the Commission's regulations thereunder raise significant constitutional questions of their own, which, obviously, are not before the Court. But if the issue is "vertical integration," Section 11(c)—unlike the must carry provisions—at least addresses itself to that issue.

III. THE MUST CARRY REQUIREMENTS FAIL TO SURVIVE REVIEW UNDER ANY LEVEL OF FIRST AMENDMENT SCRUTINY

For all the reasons set forth above, Sections 4 and 5 are subject to "strict" or "exacting" scrutiny. These provisions may be upheld—if at all—only if the government can demonstrate that they are necessary to serve a "compelling" governmental interest and employ "the least restrictive means to further the articulated interest." [61] In view of the unfocused, prophylactic, highly-intrusive nature of the must carry provisions—which in one stroke appropriate editorial control of roughly 40 percent of channel capacity on all cable systems throughout the country—they cannot conceivably survive such review; indeed, the government makes no claim that they can.

Yet even under the less demanding *O'Brien* test appellees advocate, the result would be the same. Under *O'Brien*, the government must demonstrate that the statute "furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression," and that the law's "incidental restriction on alleged First Amendment freedoms is no greater than is essential" to further its "non-speech" objective. 391 U.S. at 376-77. The majority below, having concluded—erroneously—that exacting First Amendment scrutiny did not apply, proceeded to give the purported justifications for the must carry provisions no independent scrutiny *at all*. Instead, the Court merely "deferred" to the "findings" of substantiality and necessity set forth in Section 2 of the Act. J.S. App. 15a ("Federal courts do not ordinarily review the adequacy of the record before Congress to support the laws it enacts.").

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[61] *Sable Communications*, 492 U.S. at 126. *See also Burson*, 112 S. Ct. at 1852 ("To survive strict scrutiny . . . a State must do more than assert a compelling state interest—it must demonstrate that its law is necessary to serve the asserted interest.").

What matters, however, is not that proponents of the legislation have drafted "findings," but whether such findings actually justify the burdens the legislature has imposed on First Amendment freedoms.[62] Even where an Act of Congress is at issue, " '[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.' "[63] Here, as in *Quincy* and *Century*, the sweeping must carry benefits granted to broadcasters cannot survive a faithful application of the *O'Brien* criteria, much less the rigors of strict scrutiny.

A. The Substantiality of the Asserted Interests

The government bears the burden, even under *O'Brien*, of demonstrating that the asserted governmental interests "are sufficiently substantial to justify the effect" of the challenged regulation on protected expression. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984). In commercial speech cases applying an "intermediate" level of scrutiny comparable to the *O'Brien* standard, the Court has emphasized that the government "must demonstrate that the harms it recites are real," and more than mere "speculation or conjecture" is required for the government to meet its burden of justification.[64] The "governmental interests"

[62] *See* J.S. App. 67a ("[T]he legislative findings simply do not support the inferences needed to sustain must-carry.") (Williams, J., dissenting). *See also* J.A. 183-94, responding to J.A. 81-86.

[63] *Sable Communications*, 492 U.S. at 129 (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843-44 (1978)). In *Sable*, the Court made clear that "whatever deference is due legislative findings would not foreclose our independent judgment of the facts bearing on an issue of constitutional law" (concluding that a federal statute violated the First Amendment). *See also Lamprecht v. FCC*, 958 F.2d 382, 392 n.2 (D.C. Cir. 1992) ("If a legislature could make a statute constitutional simply by 'finding' that black is white or freedom, slavery, judicial review would be an elaborate farce.") (Thomas, J.).

[64] *Edenfield v. Fane*, 113 S. Ct. 1792, 1800 (1993). *See also City of Cincinnati*, 113 S. Ct. at 1510 & n.12 ("we require the governmental goal to be substantial, and the costs to be carefully calculated") (quoting *Bd. of Trustees of the State Univ. of New York*

purportedly justifying the constitutional intrusions imposed by the must carry requirements are set forth in Section 2 of the Act.[65] The Senate Report formulates the interests somewhat differently, but more succinctly, as (1) "preserving" local television service, (2) promoting the widespread dissemination of information from "diverse" sources, and (3) "promoting fair competition" in the video marketplace. Senate Report at 58.

As demonstrated below, the purported "threat" to these asserted interests simply cannot be substantiated. We emphasize at the outset, however, that even assuming that interests such as "preserving" local broadcasting or "promoting a diversity of views" could be understood to be substantial "in the abstract," *Edenfield*, 113 S. Ct. at 1800, promoting the speech of a particular class of speakers by mandating that they have access to public audiences through means which necessarily restrict other, less-favored speakers' access to the same audiences is *not* a legitimate governmental objective.[66] Certainly there is no "substantial governmental and First Amendment interest" (*see* 1992 Cable Act §§ 2(a)(6), (7)) in restraining First Amendment freedoms.

1. *"Preserving Local Broadcasting"*

Assuming, again, that burdening the speech of certain classes of speakers in order protect the economic well-

v. Fox, 492 U.S. 469, 480 (1989)). In *Fox*, the Court noted that the test applicable to restrictions on commercial speech is "substantially similar" to that applicable to "time, place, and manner" regulations. 492 U.S. at 477.

[65] As noted *supra*, these interests are stated variously as "promoting a diversity of views," §§ 2(a)(6), 2(b)(1); promoting "unique noncommercial educational programming," § 2(a)(7); ensuring that broadcast stations "continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate," § 2(a)(11), and promoting "local origination of programming." § 2(a)(10).

[66] *Pacific Gas & Elec. Co. v. Pub. Util. Comm'n of California*, 475 U.S. 1, 12 (1986) (plurality opinion); *Buckley*, 424 U.S. at 48-49; *Miami Herald*, 418 U.S. at 248, 258.

being of a governmentally-favored segment of the media is legitimate in concept, the government cannot establish that the asserted threat to the "economic viability" of local broadcasting (1992 Cable Act § 2(a)(16)) is sufficiently "real" to justify the intrusions of must carry. The FCC's own data demonstrates that, as of December 1992, the total number of full power commercial television stations has increased by more than 25 percent since the demise of the FCC's must carry rules in July 1985 (from 915 to 1,147).[67] Similarly, the number of noncommercial stations has grown substantially, increasing approximately 21 percent during the same period (from 299 to 362). *Id.* In addition, there has been *dramatic* growth in the number of local low power broadcast television stations, expanding from 343 stations in July 1985 to 1,310 in December 1992—a 282 percent increase. *Id.* Overall, the number of broadcast television stations has nearly doubled since the *Quincy* decision.

Other data suggests "local broadcasting" is not facing extinction. According to financial data compiled by appellee National Association of Broadcasters ("NAB"), in the year *prior* to imposition of the current mandatory carriage requirements, average pre-tax profits among independent stations more than doubled.[68] During the same period, average pre-tax profits among network affiliates increased by more than 36 percent,[69] continuing a long trend of significant profitability.[70] Plainly the government lacks authority to silence members of the press whenever, in the government's view, a competing segment of the media is not *growing fast* enough. As was the case in

[67] *Compare* FCC News Release: Broadcast Station Totals as of December 31, 1992 (Jan. 13, 1993), *with* FCC News Release: Broadcast Station Totals for July 1985 (Aug. 9, 1985).

[68] *See* NAB, *Television Financial Report* 64, 181 (1993).

[69] *See id.* at 33, 150.

[70] Since the demise of the first must carry rules, the average annual pre-tax profits of network affiliates have averaged more than 24 percent of net revenues, as shown in NAB's *Television Financial Report* for each of the years 1986 through 1993.

Quincy, it cannot be shown "that without the protection afforded by the must-carry rules the economic health of local broadcast television is threatened by cable." 768 F.2d at 1455. *See* J.S. App. 60a-67a.

2. *"Promoting Diversity"*

Assuming, *arguendo*, the legitimacy of a governmental effort to "promote diversity" by means of burdening the First Amendment freedoms of some elements of society, we start with the finding of the Senate Commerce Committee in its report accompanying the 1992 Cable Act that "[p]rogramming choices have . . . grown about 50 percent" since 1984—in the *absence* of must carry. Senate Report at 3. As described *supra*, video programming alternatives from every source—including broadcast outlets, locally-originated cable programming, and especially cable program networks—have expanded dramatically since the *Quincy* decision.

In view of (a) previous real world experience with must carry and its harmful effects on cable programmers as documented in *Quincy* and *Century*, (b) the fact that the demise of must carry and its "regulatory siblings" resulted in a great expansion of innovative programming alternatives, and (c) the FCC's express findings that cable program networks have provided "a significant array of diverse programming" contributing to video programming diversity,[71] one would think that Congress would not resurrect must carry in a statute purportedly aimed at promoting a "diversity" of video programming alternatives without carefully assessing the necessarily negative impact of sweeping new must carry requirements on cable programmers. Instead, the effect on cable programmers did not appear to enter into the calculus of costs and benefits

[71] Both in connection with must carry and its review of the "fairness doctrine," the FCC has found that cable program networks have contributed substantially to programming diversity. *See Report and Order*, 1 FCC Rcd at 880; *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC2d 145, 196-221 (1985); *In re Complaint of Syracuse Peace Council*, 2 FCC Rcd 5043, 5051-54 (1987).

associated with the provisions *at all*; the House Report states that in enacting the must carry requirements, "the Committee seeks to balance the interests of cable operators, broadcasters, and the public." [72]

As Judge Williams noted, there is nothing to suggest that requiring cable operators to carry broadcast stations they would not otherwise choose to carry *in lieu of* cable networks or other programming will promote "diversity." J.S. App. 58a. Because *most* local broadcast stations are carried in any event, where the must carry rules have an effect "it will only be to replace the mix chosen by cablecasters—whose livelihoods depend largely on satisfying audience demand—with a mix derived from congressional dictate." *Id.*

3. *"Promoting Fair Competition"*

To the extent the government seeks to justify the must carry provisions as a remedy to an alleged problem of "anticompetitive" behavior on the part of cable operators, this justification is premised on assertions that (a) decisions by cable operators not to carry particular broadcast stations may generally and fairly be characterized as "anticompetitive conduct"; and (b) the instances of such allegedly anticompetitive conduct are so widespread and alarming as to require a broad, prophylactic solution despite the intrusion on precious First Amendment freedoms. Neither assertion withstands scrutiny.

Signal carriage studies show that the vast majority of broadcast stations are carried on cable systems in the *absence* of must carry rules, and that the number of "drops" of broadcast stations by cable systems is utterly insignificant in view of the overall carriage picture. *See generally* J.S. App. 63a-64a. The FCC's 1988 Staff Report, upon which Congress principally relied,[73] showed that approximately 80 percent of cable systems responding reported *no* instances of discontinued or denied carriage, with an additional 10 percent of the systems reporting discontinued or denied carriage of a *single* station.[74] Indeed, a *greater* number of broadcast television stations were being carried on cable systems in 1990 than in 1985, when the Commission's must carry rules were first struck down. J.A. 305. Consistent with this data, Congress acknowledged that it "has *not* found that cable systems are engaging in a widespread pattern of denying carriage of local television stations. . . ." [75]

Nonetheless, the legislative "findings" postulate that because cable systems and broadcast stations compete for advertising revenues, cable operators have "incentives" to drop and otherwise harm broadcast stations, giving rise to the need for new must carry requirements to protect the "economic viability" of free broadcast television. *See*

[72] House Report at 57-58. The committee reports contain no discussion of the impact on cable programmers other than the bald assertion that the legislation "ensures adequate opportunity for cable program services to obtain access to cable audiences," providing no support or explanation for this statement other than to assert that cable system channel capacity "is likely to continue to expand." *Id.* at 61.

[73] Staff Report, Policy and Rules Division of the Mass Media Bureau, *Cable System Broadcast Signal Carriage Survey Report*, (Sept. 1, 1988) ("1988 Staff Report"). The committee reports present only selected data from the relevant studies—for example, there is no discussion of the number of broadcast stations that have been *added* to cable system line-ups—and the data that is referred to is presented in what appears to be an intentionally misleading and confusing manner. *See* House Report at 52; Senate Report at 42-44.

[74] 1988 Staff Report at 13. Moreover, a second study Congress cited demonstrated that 94 percent of cable systems carried *all* stations that would have qualified for carriage under the carriage rules struck down in *Century*, that 98 percent of all broadcast stations so-qualified were in fact being carried, and that a substantial number of cable systems *added* broadcast stations to their line-ups after the demise of the FCC's must carry rules. NCTA, *Broadcast Station Carriage Survey* 8 (Sept. 1988). *See* J.A. 305 (describing study and results thereof); J.S. App. 64a. The Senate Report (at 43) makes references to this study only in a cryptic, affirmatively misleading manner.

[75] House Report at 52 (emphasis supplied). *See also id.* at 67 (acknowledging that "most cable systems have continued to carry a number of local over-the-air signals").

1992 Cable Act § 2(a)(15), (16). Yet those same alleged "incentives" have existed during the past eight years, and cable systems have continued to carry most broadcast stations.[76] In fact, as Judge Williams explained, cable operator revenues are "overwhelmingly" due to *subscription fees*, not advertising. J.S. App. 65a n.6, 66a (noting ratio of subscription fee revenues to advertising revenues of 25:1). Cable operators' overwhelming economic "incentive," therefore, is to attract and retain subscribers by offering an attractive mix of programming, including whatever broadcast programming subscribers may find appealing.

What the evidence shows is not only that *most* broadcast stations are carried in the absence of must carry requirements, but that to the extent *particular* stations are not carried, cable operators' decisions have been based on something other than a generalized incentive to destroy any entity that competes for advertising. No basis whatsoever exists for concluding that a decision by an operator to carry CNN, C-SPAN, The Sci-Fi Channel, or Black Entertainment Television in lieu of WXYZ-TV can be accurately described, in any substantial number of instances, as "anticompetitive conduct."

B. The Act's Must Carry Provisions Are Substantially Broader Than Necessary To Further Any Legitimate Governmental Objective

Even under *intermediate* scrutiny, a regulation affecting First Amendment rights must be "narrowly tailored" to survive; that is, the government bears the burden of demonstrating that the regulation "is not 'substantially broader than necessary' to achieve the [government's]

[76] *See also Century*, 835 F.2d at 303 (noting that cable systems did not drop significant numbers of broadcast stations after the *Quincy* decision and citing government studies which concluded that "absent must-carry rules, cable systems can be expected to carry *many or most* local broadcast stations.") (emphasis supplied). Moreover, these incentives would appear to be less of a factor with respect to noncommercial stations, which, if they compete for local advertising dollars at all, do so to a limited, if not minimal, degree.

legitimate ends." *Ward*, 491 U.S. at 802 (quoting *Taxpayers for Vincent*, 466 U.S. at 808). *See Fox*, 492 U.S. at 480 (since the government "bears the burden of justifying its restrictions, it must affirmatively establish the fit we require"). In *Frisby v. Schultz*, 487 U.S. 474, 485 (1988), relied upon in *Ward*, the Court held that "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." If the Court's admonition that a regulation must "target" the evil it seeks to remedy and may not be "substantially broader than necessary" to further its legitimate goals has any meaning at all, the must carry provisions cannot credibly survive First Amendment review under any standard.

1. In the broadcasting context, the Court has emphasized that it is "the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Red Lion*, 395 U.S. at 390. Indeed, the government seeks to invoke this principle as the fundamental justification for must carry.[77] Yet, unlike the FCC's prior must carry rules (*see Century*, 835 F.2d at 297), the provisions Congress has enacted contain no "mechanism" whatsoever to account for viewer interests or preferences. Even assuming there may be different views as to how best to accommodate viewer preferences, the Act's approach of protecting all broadcasters *utterly without regard* to whether the carriage requirements have the effect of "thwart[ing] viewer preferences" is unsustainable. *Quincy*, 768 F.2d at 1461.

2. The must carry requirements do not "target"—even remotely—"anticompetitive conduct" by cable operators. As noted above, Congress specifically acknowledged that it has "*not* found that cable systems are engaging in a widespread pattern of denying carriage" to broadcasters,

[77] *See* Govt. Mot. to Affirm at 2 (asserting that the must carry requirements "constitute a carefully designed mechanism specifically aimed at promoting the First Amendment interests of viewers—interests this Court has described as 'paramount.'") (citing *Red Lion*).

House Report at 52 (emphasis supplied), and the relevant carriage studies confirm this fact. J.S. App. 58a, 63a-64a. Further, it cannot be disputed that in many if not virtually all instances in which a cable operator has chosen to carry a cable program network in lieu of a particular broadcaster, such decisions have been properly based on the operator's legitimate assessment of its subscribers' preferences and other valid editorial criteria.[78]

Adoption of broad, "prophylactic" measures purportedly to combat "anti-competitive treatment of broadcasters" (J.S. App. 27a), where the carriage evidence strongly suggests that at least 90 percent of cable systems have done no such thing (*see supra* at 42-43), is surely "burn-[ing] the house to roast the pig." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). As the Court recently reaffirmed—again, outside the context of strict scrutiny—" '[b]road prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' " [79] To the less than "widespread" extent that actual anticompetitive abuses by cable operators have occurred, the government "can regulate such abuses . . . through far less restrictive and more precise means." *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466, 476 (1988), such as through case-specific application of the antitrust laws.[80] *See Riley*, 487 U.S. at 795 (even though alternative of enforcing state antifraud statute may not be the "most efficient" means of addressing legitimate state concern, "we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency.").

3. In *Quincy*, the D.C. Circuit found that "if the goal [of must carry] is to preserve 'localism' and not 'local broadcasters,' the [Commission's] must carry rules are 'grossly' overinclusive." 768 F.2d at 1460 (internal citation omitted). The Commission's rules, the court noted, indiscriminately protected all local broadcasters without regard to the amount of local programming actually offered by the broadcaster and without reference to the amount of local programming otherwise offered by the cable system. *Id.*

The must carry requirements of the 1992 Cable Act are "grossly overinclusive" in the same manner as the rules struck down in *Quincy*. While purportedly aimed at promoting "local origination of programming" (1992 Cable Act § 2(a)(10)),[81] they, too, require a cable system to carry broadcast stations without regard to the quantity of local programming originated by those stations or the quantity of local programming originated or otherwise made available by the cable system.[82] They should suffer the same fate.

4. Perhaps the most blunderbuss feature of the must carry regime is Congress's decision to appropriate a flat one-third of each cable system's channel capacity for commercial broadcasters regardless of the size of the system. A subscriber to an average 39-channel system is mandated to receive up to 13 commercial broadcast stations (plus *all* local noncommercial stations), while a subscriber to a 60-channel system may receive 20, even if the two systems are in the same television market as defined by the FCC. *See* 47 U.S.C. § 534(h)(1)(C). Neither Congress nor the FCC has attempted to establish a baseline beyond which government intervention is deemed un-

[78] *See, e.g.*, J.A. 135-36, 146-47, 274-75, 327-28, 330-31.

[79] *Edenfield*, 113 S. Ct. at 1803-04 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

[80] *See Sunbelt Television, Inc. v. Jones Intercable, Inc.*, 795 F. Supp. 333, 336 (C.D. Cal. 1992).

[81] Promoting local content in programming is, of course, a content-based, speech-specific objective. *See* J.S. App. 61a.

[82] Section 5 even requires cable operators to "import" the signals of noncommercial stations from distant communities if one is not available locally. 47 U.S.C. § 535(b)(2)(B)(i). Obviously, requiring such importation does not serve the goal of "localism," nor could it conceivably be a remedy for "anticompetitive" conduct by the operator.

necessary to "preserve" local broadcasting.[83] And the channel capacity of a cable system is, of course, completely fortuitous. There is simply no basis upon which to conclude that appropriating a flat one-third of channel capacity of all cable systems nationwide for commercial broadcasters is "tailored" at all to any of the asserted governmental interests.

5. The Act's channel positioning requirements also burden substantially more speech than is justifiable in furtherance of any legitimate governmental interest. Both Sections 4 and 5 permit a broadcaster to demand carriage on its over-the-air channel position *or* the channel number *on which it was carried on July 19, 1985*. *See* note 29, *supra*. The legislative reports assert that cable operators have repositioned broadcast stations for allegedly "anticompetitive" reasons, again relying upon the purported incentive of cable operators to harm broadcasters because of competition for advertising revenues. *See* Senate Report at 44. Even assuming, *arguendo*, that changes of channel position could generally be regarded as "anticompetitive" conduct,[84] the government can have *no* legitimate interest in requiring carriage of broadcast stations on any channel *other* than the channel on which it is broadcast over-the-air. The only purpose for granting broadcasters the right to choose some other channel position is to guarantee them the most favorable channel positions.[85]

6. Finally, that the must carry provisions are tailored to the broadcasters'—not the public's—interests is further exposed by the "retransmission consent" option for commercial broadcasters provided by Section 6 of the Act. Section 6 empowers broadcast stations to *override* the asserted governmental interest in ensuring public access to local broadcast programming by withholding their signals from a cable operator unless the station gets paid (or for any other reason). *See supra* at 14. Instead of furthering the paramount First Amendment interests of viewers, as the government claims, Congress has enacted a scheme with two basic elements: (1) redistribution of wealth from cable operators to powerful broadcasters; and (2) a legislative mandate that the least popular local broadcasters, who otherwise might fail in the competition for public attention in the marketplace, *must* be carried on cable systems even though viewers might prefer to watch A&E, C-SPAN, Lifetime, USA Network, or programming of other appellants represented here.

CONCLUSION

The Court should reverse the decision of the district court, declare Sections 4 and 5 of the 1992 Cable Act to be in violation of the First Amendment, enjoin the federal defendants from enforcement thereof, and remand

[83] The *Quincy* court held that in the absence of such a baseline "we simply cannot know whether the rules are adequately tailored to pass constitutional muster." 768 F.2d at 1461.

[84] Appellants emphatically deny that such characterization is accurate or sustainable. The past several years have seen enormous growth in new programming services, together with expansions in channel capacity for many cable systems. If a cable system expands from 12 to 26 channels, it is not necessarily "anticompetitive" for a cable operator to decide to add Headline News to its line-up and to carry it somewhere in its top 12 channels. If the some system subsequently expands to 36 or 56 channels, it will be necessary to rethink the channel line-up again. Broadcasters *and* cable program networks get moved in this process, and, overall, broadcasters tend to do *better* with respect to channel position than cable program networks. Again, the Act's premise—that repositioning can *uniformly* be treated as an "anticompetitive" practice—renders the channel positioning requirements "grossly overinclusive."

[85] The papers Station WNYC-TV (New York, New York) filed on January 29, 1993, in the district court in support of its motion for a temporary restraining order against Time Warner illustrate the effect of the channel positioning requirements. Station WNYC complained bitterly that it was being repositioned from channel 3 "to the hinterland of channel 31"—*its over-the-air position*. Station WNYC described channel 3, where TNT had been placed, as "substantially more valuable," and asserted that "viewers browsing among channels are far less likely to encounter WNYC at channel 31 then [sic] at channel 3." WYNC Mem. at 1, 7 (R. 133 in 92-2247). Pursuant to Section 5, the FCC has ordered Time Warner to return WNYC to channel 3, *Complaint of WNYC Communications Group*, 8 FCC Rcd 3925 (1993), and TNT is now carried on channel 31.

the case to the district court to resolve the issue of whether Section 6 of the 1992 Cable Act is severable from Section 4.[50]

Respectfully submitted,

BRUCE D. SOKLER
Counsel of Record
PETER KIMM, JR.
GREGORY A. LEWIS
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C.
701 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300
Counsel for Appellants
Turner Broadcasting System, Inc., Arts & Entertainment Network, Black Entertainment Television, Inc., E! Entertainment Television, Inc., Hearst/ABC-Viacom Entertainment Services, International Family Entertainment, Inc., National Cable Satellite Corporation dba C-SPAN, QVC Networks Inc., The Travel Channel, Inc., and USA Networks

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[50] *See* J.S. App. 7a n.10.